



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R08-OAR-2010-0406; FRL-9206-02-R8]

Approval and Promulgation of Air Quality Implementation Plans; North Dakota; Regional Haze State and Federal Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is finalizing approval of a State Implementation Plan (SIP) revision submitted by the State of North Dakota on August 3, 2020, addressing regional haze. Specifically, EPA is approving Amendment No. 2 to the North Dakota SIP for Regional Haze to satisfy certain requirements for the first implementation period of the Clean Air Act's (CAA) regional haze program. Amendment No. 2 adopts the same regional haze requirements for nitrogen oxides (NO_x) for Antelope Valley Station Units 1 and 2 promulgated by EPA in our 2012 Federal Implementation Plan (FIP). In conjunction with the approval of Amendment No. 2, we are also withdrawing the 2012 FIP as it applies to the Antelope Valley Station as well as certain provisions related to Coal Creek Station that were vacated by a judicial determination. EPA will work with North Dakota to ensure that the State corrects the SIP deficiencies related to Coal Creek Station. EPA is finalizing this action pursuant to sections 110 and 169A of the CAA.

DATES: This rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2010-0406. All documents in the docket are listed on the <https://www.regulations.gov> website. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the website and will be publicly available only in hard copy form. Publicly available docket materials are available through <https://www.regulations.gov>, or please call or email

the person identified in the **FOR FURTHER INFORMATION CONTACT** section for additional availability information.

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SUPPLEMENTARY INFORMATION:

Throughout this document wherever “we,” “us,” or “our” is used, we mean the EPA.

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I. Background

The background for this action is described in detail in our March 12, 2021 proposed rule.¹ In the proposed rule, EPA proposed to approve Amendment No. 2 to the North Dakota Regional Haze SIP as described below.

A. Amendment No. 2 to the North Dakota Regional Haze State Implementation Plan

We proposed to approve the following elements of Amendment No. 2 to the North Dakota Regional Haze SIP:²

- A NO_x emission limit of 0.17 lb/MMBtu (30-day rolling average) each for Antelope Valley Station Units 1 and 2, applicable at all times including during periods of startup, shutdown, emergency, and malfunction;
- The associated monitoring, recordkeeping, and reporting requirements for Antelope Valley Station Units 1 and 2;
- Provisions requiring compliance with the emission limit and monitoring, recordkeeping, and reporting requirements in the SIP revision no later than the effective date of this final action; and
- Related nonregulatory provisions as reflected in additions and changes to the 2010 Regional Haze SIP in section 9.5.1 (Antelope Valley Station), Appendix J.1.6

¹ 86 FR 14055 (March 12, 2021).

² The regulatory provisions of SIP Amendment No. 2 (which are the only parts of Amendment No. 2 being incorporated by reference) are contained in Appendix D.6, Permit to Construct for Antelope Valley, number PTC20031.

(Federal Land Manager Comments on Amendment No. 2 and Department's Response), and Appendix J.3.4 (U.S. Environmental Protection Agency Comments on Amendment No. 2 and Department's Response).

We proposed to find that North Dakota fulfilled its requirement to consult with the Federal Land Managers (FLMs) in development of Amendment No. 2.

We also proposed to restore certain other nonregulatory text amendments under 40 CFR 52.1820(e). The proposed amendments include incorporation of provisions previously approved in our 2012 final rule.³ EPA partially approved these provisions as meeting the requirements of the CAA and applicable regulations in previous actions;⁴ however, when updating 40 CFR 52.1820(e) in 2015, we inadvertently deleted all approved provisions relevant to North Dakota regional haze.⁵ We proposed to remedy that error; however, we did not otherwise address or reopen for comment any of the previously approved provisions. We deem any comments on these provisions beyond the scope of this action.

B. Federal Implementation Plan Withdrawal

Because we proposed to find that Amendment No. 2 satisfies the reasonable progress requirements for NO_x at Antelope Valley Station Units 1 and 2 for the first regional haze planning period, we also proposed to withdraw the corresponding portions of the North Dakota Regional Haze FIP at 40 CFR 52.1825.

In addition, EPA stated that we planned to remove from the Code of Federal Regulations the FIP requirements for Coal Creek Station that the U.S. Court of Appeals for the Eighth Circuit vacated in *North Dakota v. EPA*.⁶ Because this is a purely ministerial action to ensure that the Code of Federal Regulations reflects current case law, we did not invite public comment on our removal of the vacated language. North Dakota's BART obligation for Coal Creek Station remains outstanding.

³ 77 FR 20894 (April 6, 2012).

⁴ *Id.*

⁵ 80 FR 76211 (December 8, 2015).

⁶ 730 F.3d 750, 764 (8th Cir. 2013), *cert. denied*, 134 S. Ct. 2662 (2014).

We did not propose any other changes related to our 2012 final rule because no other changes were addressed in Amendment No. 2 or required by the *North Dakota* decision. Accordingly, our determinations regarding North Dakota's reasonable progress goals, long-term strategy, and interstate transport obligations under CAA section 110(a)(2)(D)(i)(II) concerning visibility protection,⁷ remain in place.⁸ We did not reopen or take comment on these aspects of our 2012 final rule. We deem any comments on these issues beyond the scope of this action.

Our proposed rule provided background on the requirements of the CAA and EPA's Regional Haze Rule, and EPA's rationale for its proposed action. That background information and rationale will not be restated here. For the reasons stated in the proposed rule and this document, EPA approves Amendment No. 2 to the North Dakota SIP for Regional Haze to satisfy certain requirements for the first implementation period⁹ of the CAA's regional haze program.

II. Public Comments and EPA Responses

We received comments from the public and a group of conservation organizations through the internet and mail. The full text of comments received from these commenters is included in the publicly posted docket associated with this action at <https://www.regulations.gov>. The National Parks Conservation Association, Sierra Club, and Badlands Conservation Alliance (Conservation Organizations) submitted detailed written comments in opposition to our proposed approval of Amendment No. 2. We also received a short comment from a member of the public in support of our proposed approval.

Comment summary: The commenters assert that EPA's proposal relies on outdated data and technical information. They state that North Dakota's SIP submittal does not contain a four-factor reasonable progress analysis of its own, nor does it reference EPA's FIP analysis. Further the commenters state that the emission data and technical analysis regarding costs and controls in EPA's 2012 FIP are more than nine years old, and no longer represent current operations. The commenters

⁷ 42 U.S.C. 7410(a)(2)(D)(i)(II).

⁸ 77 FR 20896, 20899-900; see also 85 FR 20165, 20177 (April 10, 2020) (regarding the status of North Dakota's obligations under CAA section 110(a)(2)(D)(i)(II) concerning visibility protection).

⁹ "Implementation period" and "planning period" are used interchangeably in this document.

state that current operational data is missing from the record, and that Antelope Valley Station Units 1 and 2 are currently meeting NO_x emission limits of 0.11 lb/MMBtu, which is significantly less than the FIP and SIP revision limit of 0.17 lb/MMBtu. The commenters assert that EPA's regulations require that SIPs must provide for "public availability of emission data reported by source owners or operators or otherwise obtained by a State or local agency," which is then required to be correlated with the applicable reasonable progress emission limitations. The commenters assert that neither North Dakota's SIP submittal nor EPA's proposal contain an updated reasonable progress analysis and consideration of additional controls.

Response: EPA disagrees with these comments. First, neither North Dakota nor EPA is required to conduct a new four factor reasonable progress analysis for this action because the relevant analysis was completed during the first regional haze planning period in support of EPA's 2012 FIP. As explained in the proposed rule, this action involves a mere transfer of the first planning period NO_x reasonable progress requirements for Antelope Valley Station Units 1 and 2 from EPA's 2012 FIP to North Dakota's SIP.

Under the Regional Haze Rule, states were required to submit SIP revisions including first planning period regional haze requirements on December 17, 2007.¹⁰ North Dakota submitted its regional haze SIP revision in 2010.¹¹ As explained in the proposed rule, in 2012, EPA disapproved North Dakota's NO_x reasonable progress determination for Antelope Valley Station Units 1 and 2 and instead promulgated a FIP. To support the FIP, EPA performed a thorough, six-step, reasonable progress analysis.¹² EPA presented control efficiencies, emissions data, emissions reductions for six different control options (including no controls), analyzed costs for five control options, and noted visibility benefits of 0.754 deciviews at Theodore Roosevelt National Park from the installation of new low-NO_x burners and separated overfire air (LNB and SOFA, or "combustion controls") on Antelope Valley Station Units 1 and 2. As a result of EPA's six-step analysis, EPA determined that

¹⁰ 40 CFR 51.308(b).

¹¹ 86 FR 14057.

¹² 76 FR 58570, 58630-32 (September 21, 2011).

an emission limit consistent with the installation of LNB and SOFA (0.17 lb/MMBtu on a 30-day rolling average) was appropriate to require as reasonable progress for the first planning period.¹³ North Dakota's SIP revision at issue in this action adopts the *exact same* emission limit and associated monitoring, recordkeeping, and reporting requirements that EPA included in its 2012 FIP, thereby adopting the *exact same* first planning period NO_x reasonable progress requirements for Antelope Valley Station Units 1 and 2 that EPA set in 2012. Thus, neither North Dakota nor EPA was required to perform a new analysis duplicative of EPA's earlier analysis for purposes of this federal-to-state transfer.

Second, neither North Dakota nor EPA was required to update the prior analysis with current emissions data or tighten the NO_x emission limit based on current operations.¹⁴ Again, the determination being transferred from EPA's 2012 FIP to North Dakota's SIP in this action is a first planning period determination. The analysis that supported EPA's 2012 determination and the emission limit that EPA set (0.17 lbs/MMBtu on a 30-day rolling average) was consistent with the EPA's understanding at the time of the emission limit achievable with combustion controls at similar units.¹⁵ That Antelope Valley Station Units 1 and 2 currently could meet a lower NO_x emission limit with the installed combustion controls may be relevant to North Dakota's forthcoming second planning period regional haze SIP revision, but that information does not demand a revised analysis to support the mere transfer of first planning period requirements from EPA's FIP to North Dakota's SIP.

Comment summary: The commenters assert that EPA must not approve North Dakota's proposed SIP amendments because they are inconsistent with EPA's FIP. Specifically, the commenters assert that the regulatory text in 40 CFR 52.1820(e) contains two conflicting provisions:

¹³ 77 FR 20899.

¹⁴ Note that the commenters are incorrect that current operational data is missing from the record for this action. See AVS Monthly AMPD Data, EPA-R08-OAR-2010-0406-0440.

¹⁵ 76 FR 58632. See also, 40 CFR part 51, appendix Y, IV.E.5 (stating that 0.17 lb/MMBtu is the presumptive limit that can be met by tangential-fired boilers using combustion control technology and burning lignite coal).

- EPA proposes to adopt by reference North Dakota’s SIP that was effective under State law on July 8, 2020 (which contains information and references to the disapproved SIP in Section 9.5.1 of North Dakota’s SIP Amendment No. 2); and
- While in the same portion of the regulatory text, EPA’s “Comments” for the Regional Haze line entry indicates that it is incorporating by reference the entire State Plan “[e]xcluding provisions disapproved on April 6, 2012. 77 FR 20894.”

The commenters state that Section 9.5.1 of North Dakota’s SIP references assumptions and analysis from the disapproved sections of its Regional Haze SIP, including control efficiencies and emission reductions. The commenters state that EPA’s disapproval explained that North Dakota’s control efficiencies and emission reductions for Units 1 and 2 differed from EPA analysis, and EPA ultimately relied on its own analysis promulgating the FIP. The commenters also argue that EPA’s current proposal erred in stating that North Dakota’s SIP Amendment No. 2 merely adopts the FIP. The commenters conclude that EPA is proposing to approve portions of North Dakota’s SIP that it earlier disapproved. The commenters also assert that North Dakota has attempted to use this SIP amendment to restore assumptions and analysis EPA disapproved and replaced with its FIP analysis and final reasonable progress determination.

The commenters contend that it is unreasonable and inappropriate for EPA to approve the sentences in North Dakota’s narrative in Section 9.5.1 because they are inconsistent with EPA’s FIP analysis. Additionally, the commenters contend that neither North Dakota’s SIP amendment nor EPA’s proposal contain the substantive technical analysis to support North Dakota’s brief discussion in Section 9.5.1. The commenters state that there is no information for the public to review and comment on. The commenters believe that North Dakota may have included the discussion and reference to its disapproved SIP provisions in an attempt to then reference this information as “EPA approved” in its upcoming proposed regional haze SIP due to EPA by July 31, 2021. The commenters conclude that EPA must not approve the State’s disapproved first round reasonable progress analysis for Antelope Valley Station.

Response: EPA disagrees with this comment. First, the commenters are incorrect that EPA's 2012 disapproval "explained that [North Dakota's] control efficiencies and emission reductions for Units 1 and 2 differed from [the] EPA analysis, and EPA ultimately relied on its own analysis promulgating the FIP." In the 2011 proposed rule, we explicitly stated that "[o]ur analysis is based on the information provided by North Dakota, except that, as we explain below, we are disregarding North Dakota's visibility analysis."¹⁶ In EPA's analysis supporting the FIP, the control efficiency and emission reductions for each control were identical to those in North Dakota's analysis.¹⁷ For example, both EPA and North Dakota assumed that LNB with SOFA could achieve a 51% control efficiency and reduce NO_x emissions by 3,889 tons per year at Unit 1 and by 3,450 tons per year at Unit 2. Thus, by relying on the 2012 analysis for this rule, EPA is not relying on assumptions and analysis that EPA disapproved in 2012, as the commenters contend.

Moreover, as acknowledged by the commenters, the proposed regulatory text in 40 CFR 52.1820(e) for this action specifies that the provisions of the 2010 SIP that were disapproved in our 2012 final action, including those in Section 9.5.1, will remain disapproved.¹⁸ Thus, in this action, we are not approving previously disapproved portions of North Dakota's SIP.

Finally, the commenters presented no evidence to support their contention that North Dakota intends to rely on the technical analysis from its 2010 SIP for its second planning period regional haze SIP revision. We are aware that North Dakota has selected Antelope Valley Station as a source to analyze for additional control measures in the second planning period. We are also aware that the new four factor analysis conducted for North Dakota's second planning period SIP revision will be based on an updated technical analysis, including updated representative baseline emissions, control efficiencies, emission reductions, and costs.¹⁹ North Dakota's second planning period SIP revision

¹⁶ 76 FR 58631.

¹⁷ Compare id., Table 71, Summary of Antelope Valley Station NO_x Reasonable Progress Analysis Control Technologies for Unit 1 and 2 Boilers, with North Dakota Department of Health, North Dakota State Implementation Plan for Regional Haze, February 24, 2010, Table 9.8, Control Cost Options, page 204.

¹⁸ 86 FR 14061.

¹⁹ North Dakota Department of Environmental Quality, Air Pollution Control Program, Division of Air Quality, DRAFT for Federal Land Manager Review, North Dakota State Implementation Plan for Regional Haze, available at https://deq.nd.gov/publications/AQ/Planning/RegionalHaze/Round_2/ND_RH_SIP_v2.0DRAFT.pdf. See four-factor analysis for Antelope Valley Station in Appendix A.2.

and the accompanying new four factor analysis will be subject to EPA review and subsequent public notice and comment. Any errors or deficiencies in the analysis will be addressed at that time.

Comment summary: The commenters assert that North Dakota has not made an “official plan submission” to EPA and EPA has not demonstrated that the SIP submittal is complete. Specifically, the commenters assert that North Dakota failed to submit a SIP revision consistent with 40 CFR part 51, appendix V, because the submittal does not describe the “[c]ompliance/enforcement strategies” it intends to follow in implementing the SIP, “including how compliance will be determined in practice.” They assert that the SIP revision also lacks a “description of the enforcement methods” that North Dakota plans to use when it implements the reasonable progress control strategy for the Antelope Valley Station. Additionally, the commenters contend that North Dakota’s SIP revision lacks a technical basis and reasoned analysis for including EPA’s FIP in the SIP. The commenters state that it is unclear what authority North Dakota relied on to adopt and then implement the SIP.

The commenters further assert that EPA failed to prepare a completeness analysis under appendix V for public review and comment. The commenters contend that without a completeness analysis, EPA has not demonstrated that the SIP revision contains “[e]vidence that the plan contains emission limitations, work practice standards and recordkeeping/reporting requirements, where necessary, to ensure [reasonable progress determination] emission levels.”

Response: EPA disagrees with these comments. CAA section 110(k) provides a two-step process for EPA’s review of SIP submittals. First, within six months of receiving a SIP submission, EPA must make a threshold “completeness determination” to determine whether the SIP contains certain “minimum criteria” designated by EPA as “the information necessary to . . . determine whether the plan submission complies with the provisions of the CAA.”²⁰ These minimum criteria are listed in 40 CFR part 51, appendix V.²¹ There is no requirement in the CAA or EPA’s regulations that EPA document its completeness review prior to proposing to approve a SIP revision. To the contrary, if EPA fails to make the completeness determination within six months, the SIP submission

²⁰ 42 U.S.C. 7410(k)(1)(A), (B).

²¹ 40 CFR part 51, appendix V.

is deemed complete by operation of law.²² Here, EPA received North Dakota's SIP submittal on July 28, 2020. EPA did not make a formal completeness determination within six months; thus, the SIP submittal was deemed complete by operation of law and constitutes an official submission.²³ North Dakota's authority to adopt the SIP is addressed in the Opinion issued by the North Dakota Office of Attorney General and submitted with the SIP revision.²⁴

In the second step of the two-step process, EPA evaluates SIP submittals for compliance with substantive CAA requirements.²⁵ Here, the relevant provisions are CAA sections 110 and 169A and 40 CFR 51.308. EPA explained in the proposed rule and elsewhere in this document how North Dakota's SIP revision complies with these substantive requirements of the CAA and Regional Haze Rule, and specifically addresses the commenters' concerns regarding enforceability in this document below.²⁶ Thus, the commenters' assertions that North Dakota's SIP revision was inadequate because it lacked appendix V criteria and that EPA's proposal was inadequate because it lacked an appendix V completeness determination are without merit.

Comment summary: The commenters state that, in order to approve North Dakota's SIP that replaces the FIP, the SIP revision must be substantively identical to the FIP and enforceable. The commenters contend that EPA's proposal does not include all the permit provisions necessary to make the SIP equivalent to the FIP, but instead includes only selective provisions from North Dakota's air pollution control permit to construct: "emission limit[s] for Units 1 and 2 and corresponding monitoring, recordkeeping, and reporting requirements." The commenters assert that EPA's proposal is not substantively identical to its FIP because it does not propose approving parallel permit conditions that are necessary for enforceability, such as permit conditions related to definitions, compliance dates, continuous emissions monitoring, and others. The commenters also

²² 42 U.S.C. 7410(k)(1)(C); 40 CFR part 51, appendix V, §1.2.

²³ 40 CFR part 51, appendix V, §1.2 ("A determination of completeness under this paragraph means that the submission is an official submission for purposes of §51.103.")

²⁴ Letter dated July 28, 2020, from Doug Burgum, Governor, North Dakota, to Gregory Sopkin, Regional Administrator, EPA Region 8, Subject: Revisions to North Dakota Regional Haze SIP for control of air pollution; North Dakota, Final Revisions to Implementation Plan for Control of Air Pollution, Amendment No. 2 to North Dakota State Implementation Plan First Planning Period for Regional Haze (July 2020) (Amendment No. 2) at 121.

²⁵ See *NRDC v. Browner*, 57 F.3d 1122, 1123 (D.C. Cir. 1995).

²⁶ 86 FR 14055, 14057-58.

state that there are permit conditions for which there are not parallel provisions in the FIP that, if approved into the SIP, would at least in part address their concerns regarding enforceability. Finally, the commenters state that there are permit conditions for which there are not parallel conditions in the FIP and that we do not have authority to approve, such as those related to continuous emission monitoring procedures, audits, and reporting, and to emission inventory reporting. In particular, the commenters contend that EPA must not approve the permit conditions that involve reporting on State-supplied forms because (1) the forms may contain information inconsistent with that required by the FIP, (2) the permit conditions do not specify what is on these forms, and the public did not have an opportunity to review and comment on the forms, and (3) the information in the forms is left to the State's discretion. The commenter makes similar arguments regarding monitoring procedures and audits.

Response: We agree with this comment, in part, and are making changes in this final rule accordingly. In our proposed rule, the comment column in the regulatory text for Antelope Valley Station indicated that we proposed to incorporate into the SIP those permit conditions found in the permit-to-construct (PTC20031) related only to the “NO_x BART emission limit for Units 1 and 2 and corresponding monitoring, recordkeeping, and reporting requirements.”²⁷ While this language could be understood to mean that any permit condition necessary for enforceability would be included in the SIP, the commenters interpreted it to mean that only the permit conditions in the three sections of the permit with corresponding titles would be incorporated into the SIP: Section II.A.2 – Emission Limits; Section II.A.5 – Monitoring Requirements and Conditions; and Section II.A.6 – Reporting. To provide clarity, we are removing the comment from the source-specific requirements for Antelope Valley Station Units 1 and 2. This should address the commenters' concerns regarding the permit conditions necessary for enforceability, as well as whether the SIP is substantively the same as the FIP. In addition, we note that this approach (not specifying which permit conditions are being incorporated into the SIP) is consistent with the approach we took for other sources in our 2012 final

²⁷ 86 FR 14061.

rule (i.e., for Heskett Station Units 1 and 2, Leland Olds Units 1 and 2, Milton R. Young Units 1 and 2, and Staton Station Unit 1).²⁸

We disagree that we do not have authority to, and must not, approve additional permit conditions for which there are not parallel conditions in the FIP. With the clarifying change we are making to the source-specific requirements of 40 CFR 52.1820(d) today, we are incorporating into the SIP all provisions that are necessary for enforceability (e.g., monitoring, record keeping, and reporting). Thus, any permit conditions that are in addition to parallel conditions in the FIP only serve to enhance enforceability. In any event, these additional permit conditions are included in the Title V permit for Antelope Valley Station, and are thus already federally enforceable.²⁹ Moreover, the same or similar permit conditions also appear in the permit-to-construct for each of the sources for which we approved source-specific requirements in our 2012 final rule.³⁰ Finally, the forms that concern the commenters are publicly available on North Dakota's website.³¹ We have reviewed them and find no reason to conclude that they would allow violations of the emission limit for Units 1 and 2 or the monitoring, recordkeeping, and reporting requirements, or interfere with enforceability.

Comment summary: The commenters assert that North Dakota's SIP revision did not contain an analysis under CAA section 110(l), and that EPA's analysis is inaccurate and incomplete. In particular, the commenters contend that EPA wrongly referenced a CAA section 110(l) analysis completed for the 2012 FIP. The commenters further assert that EPA wrongly considered only National Ambient Air Quality Standards (NAAQS) requirements and not other CAA requirements, including regional haze requirements, in its CAA section 110(l) analysis. Additionally, the commenters contend that the public was not provided an opportunity to comment on the required section 110(l) analysis that considers all the Act's requirements.

²⁸ 77 FR 20943.

²⁹ Air Pollution Control Title V Permit to Operate, Permit Number T5-F8600, renewal no. 4, June 26, 2019. North Dakota has a fully approved operating permit program. 40 CFR part 70, appendix A.

³⁰ 77 FR 20943.

³¹ See Title V Semi-Annual Monitoring Report, <https://www.deq.nd.gov/forms/aq/title-v/SFN52737.pdf>; Title V Annual Compliance Certification Report, <https://www.deq.nd.gov/forms/aq/title-v/SFN52738.pdf>; see also <https://www.deq.nd.gov/AQ/Forms.aspx> (list of North Dakota Air Quality Forms).

Response: EPA disagrees with these comments. CAA section 110(*I*) states in relevant part: “The Administrator shall not approve a revision of a plan if the revision would interfere with any applicable requirement concerning attainment and reasonable further progress (as defined in section 7501 of this title), and any other applicable requirement of this chapter.”³² CAA section 110(*I*) applies to all requirements of the CAA and it applies to all areas of the country, whether attainment, nonattainment, unclassifiable or maintenance for one or more of the six criteria pollutants. In general, a section 110(*I*) demonstration should address all pollutants whose emissions and/or ambient concentrations would change as a result of a plan revision. The level of rigor needed for any CAA section 110(*I*) demonstration will vary depending on the nature and circumstances of the revision.

As an initial matter, the commenters fail to identify any change to emissions or ambient concentrations of NO_x that will result from approval of North Dakota’s SIP revision. Nor can they. As we explained in the proposed rule and above in response to comments, the first planning period reasonable progress requirements for Antelope Valley Station Units 1 and 2 in North Dakota’s SIP revision are the *exact same* requirements in EPA’s 2012 FIP.³³ Thus, there is no difference in emissions between the 2012 FIP and the SIP revision. Accordingly, EPA’s approval of North Dakota’s SIP revision cannot interfere with any applicable CAA requirement.

Additionally, there was no CAA section 110(*I*) analysis for the 2012 final rule, and thus, EPA did not rely on a prior CAA 110(*I*) analysis in the 2021 proposal. Instead, in the 2021 proposal, EPA stated that “[t]he previous section of [the proposal] and our 2011 proposed rule and 2012 final rule explain how the proposed SIP revision will comply with applicable regional haze requirements and general implementation plan requirements such as enforceability.”³⁴ In other words, under CAA section 110(*I*), we proposed to find that EPA’s approval of North Dakota’s SIP revision does not interfere with the CAA’s regional haze provisions (or other implementation plan requirements) because the SIP revision mirrors EPA’s 2012 FIP requirements, which EPA determined in 2012 meet

³² 42 U.S.C. 7410(*I*).

³³ 86 FR 14057-58.

³⁴ 86 FR 14058. EPA also added that there are no NAAQS nonattainment or maintenance areas in North Dakota. See Current Nonattainment Counties for All Criteria Pollutants, <https://www3.epa.gov/airquality/greenbook/ancl.html> (last visited Jan. 11, 2021).

the requirements of the CAA's regional haze provisions (and other implementation plan requirements). Accordingly, EPA's CAA section 110(l) analysis is not inaccurate or incomplete—EPA considered potential interference with all applicable CAA requirements, including regional haze requirements. But EPA tailored its analysis to the circumstances at issue here—a mere transfer of the existing emission limit for Units 1 and 2 and the associated monitoring, recordkeeping, and reporting requirements (and no corresponding change in emissions) from EPA's 2012 FIP to an approved SIP revision. We find that approval of Amendment No. 2, and concurrent withdrawal of the corresponding FIP, are not anticipated to interfere with applicable requirements of the CAA and therefore CAA section 110(l) does not prohibit approval of this SIP revision.

Comment summary: The commenters further contend that EPA's approval of North Dakota's SIP revision would violate the CAA's anti-backsliding provisions. The commenters state that EPA may not approve North Dakota's SIP revision because it would allow increased NO_x emissions and visibility impairment in violation of the CAA section 110(l) and case law. The commenters criticize EPA for failing to evaluate how emissions will change as a result of North Dakota's SIP revision when compared to the FIP and for failing to fully evaluate the differences between the FIP and North Dakota's SIP revision.

The commenters contend that EPA's replacement of its FIP with North Dakota's SIP revision would violate CAA section 110(l) by allowing increased air pollution for several reasons. First, the commenters contend that EPA failed to propose to approve all the provisions in North Dakota's permit, which according to the commenters means that citizens and others will not have the same opportunities to enforce the emission limits as under the FIP and will result in less stringent requirements and likely increased emissions. Second, the commenters contend that EPA failed to propose approval of provisions in North Dakota's permit that would address their enforceability concerns. Third, commenters contend that EPA proposed to include provisions in the approved SIP revision that do not appear in the FIP, including provisions that allow unbounded discretion to North Dakota, which the commenters contend could also result in increasing emissions.

Response: EPA disagrees with these comments. As explained above, the transfer of first planning period NO_x regional haze requirements for Antelope Valley Station Units 1 and 2 from EPA's 2012 FIP to North Dakota's SIP will not result in any change in NO_x emissions. Moreover, as also explained above, the SIP revision and corresponding permit are not less stringent than the FIP, nor is the SIP revision less enforceable. The commenters have offered no support for their contention that, under the SIP revision, the State obtains "unbounded discretion" inconsistent with the FIP and we find none. Accordingly, there is no support for the commenters' assertion that the SIP approval results in backsliding under the CAA.³⁵

Comment summary: The commenters state that, if EPA were to take final action, it must fix fatal errors in its proposed regulatory text. In a footnote, the commenters state that EPA did not explain its authority for correcting the regulatory text to include provisions approved in 2012 and inadvertently deleted in 2015. Additionally, the commenters contend that making the correction would resolve the error going forward but would not restore the regulatory text missing from the Code of Federal Regulations from 2015 to present. The commenters contend that EPA's final action and regulatory text must clearly include language that covers the missing years so that the SIP is enforceable during that time period.

The commenters also criticize EPA for proposing a single "State effective date" of July 8, 2020, in the proposed regulatory text language in 40 CFR 52.1820(e). The commenters identify three reasons why they believe the state effective date must be corrected. First, the commenters state that the only portions of the State regional haze SIP that were effective as a matter of State law on July 8,

³⁵ *WildEarth Guardians v. EPA*, 759 F.3d 1064, 1074 (9th Cir. 2014) (finding that the petitioners identified nothing in Nevada's SIP that weakened or removed any pollution controls and that when a "SIP merely maintained the status quo, that would not interfere with the attainment or maintenance of the NAAQS" and the approval did not contravene CAA section 110(l)); see also *El Comité Para El Bienestar de Earlimart v. EPA*, 786 F.3d 688, 696-97 (9th Cir. 2015) (finding that EPA did not fail to consider CAA section 110(l) when it reasonably concluded that California's prior SIP requirement and the SIP revision requirement were equivalent). Because the SIP revision at issue here is not less stringent than the FIP, the other cases cited in footnote 40 of the comment letter are inapposite. In any event, they do not stand for the proposition that the commenters assert—neither the plain language of CAA section 110(l) nor case law supports an interpretation that *per se* prohibits approval of any SIP revision that allows an increase in emissions or weakens requirements relative to the existing implementation plan. Rather, the statute prohibits approval of such a SIP revision if it would *interfere with* attainment of the NAAQS, reasonable further progress, or any other applicable requirement of the CAA. See *Indiana v. EPA*, 796 F.3d 803, 811 (7th Cir. 2015); *Alabama Environmental Council v. EPA*, 711 F.3d 1277, 1293 (11th Cir. 2013) (quoting *Train v. NRDC, Inc.*, 421 U.S. 60, 79 (1975)); *Kentucky Resource Council v. EPA*, 467 F.3d 986, 994-996 (6th Cir. 2006).

2020, were the following: Section 9.5.1; Appendix J.1.6: FLM Comments on SIP Amendment 2; and Appendix J.3.4. Second, the commenters state that North Dakota's cover letter to Basin Electric Cooperative for construction permit PTC20031 for its Antelope Valley Station explains that the State's intent was to make the permit effective if/when EPA approved the SIP Amendment No. 2, not at the time the SIP was adopted by the State. The commenters state that EPA's proposed regulatory text for the "State effective date" needs to be clarified on this point. Third, the commenters state that the remaining sections of North Dakota's regional haze SIP incorporated by reference in 40 CFR 52.1820(e), which EPA inadvertently deleted in 2015, were effective in 2012, not on July 8, 2020. The commenters conclude that the EPA must correct these errors for SIP enforceability purposes and revise the regulatory text to reflect the three different State effective dates for the regional haze SIP.

In addition, the commenters argue that EPA's FIP contains separate emission limits for Units 1 and 2, while EPA's proposed regulatory text proposes one emission limit for both units. The commenters assert that one plantwide emission limit would mean that when one unit is down for maintenance or other reasons, Antelope Valley Station could operate the controls on the second operating unit less stringently in order to save money. The commenters conclude that, if EPA elects to finalize this proposal, it must amend this regulatory text so that it is consistent with the FIP and regional haze program requirements.

Response: As stated in our proposed rule, we did not take comment on the restoration of the nonregulatory text amendments under 40 CFR 52.1820(e) that we inadvertently deleted in 2015. Thus, we deem the comment beyond the scope of this action. Contrary to the commenters' suggestion, EPA had authority to correct this error without additional notice and comment under the "good cause" exception in the Administrative Procedure Act.³⁶ Today's action simply restores nonregulatory provisions which were previously approved after public notice and comment for the 2012 final rule. Thus, another notice and opportunity for comment to correct the error is unnecessary.

³⁶ 5 U.S.C. 553(d)(3).

Nonetheless, we disagree that it is necessary for the regulatory text to include language that covers previous regional haze actions to ensure that the regional haze SIP, as a whole, is enforceable. The nonregulatory provisions found in 40 CFR 52.1820(e), including the SIP narrative, are not enforceable. Instead, the enforceable portions of the SIP are incorporated by reference in paragraph in 40 CFR 52.1820(c), *EPA-approved regulations*, and 40 CFR 52.1820(d), *EPA-approved source specific requirements*. Thus, the nonregulatory amendments are not necessary to ensure enforceability regardless of whether citations to previous actions are listed. Moreover, the regional haze amendments have been treated in the same manner as other sections of the State's SIP. That is, only the effective date of the most recent revision to a relevant chapter or section of the SIP (in this case, July 8, 2020) is given. Finally, we are clarifying that the "State effective date" is the effective date of the State's SIP or rule, and differs from the compliance date (through the permit to construct) to meet emission limits and related requirements.

The commenters are incorrect that EPA proposed to approve a plant-wide emission limit for Units 1 and 2. The permit, PTC20031, which we are now incorporating into the SIP in whole, includes condition II.A.2 stating that "Basin Electric Power Coop. shall not emit or cause to be emitted from *each unit* NO_x in excess of 0.17 pounds per million British Thermal Units (0.17 lb/10⁶ Btu) averaged over a 30-day period (30-day rolling average)" (emphasis added). Permit condition II.A.2 is consistent with the separate emission limits in the FIP that we are withdrawing. Regardless, as discussed above, the proposed comment language in 40 CFR 52.1820(d) to which the commenters refer is not included in this final action.

Comment summary: The commenters contend that EPA's proposal fails to abide by the environmental justice requirements in 2021 Executive Orders. The commenters state that EPA is required to ensure that its action on SIP regional haze plans address any disproportionate environmental impacts of the pollution that contributes to haze. The commenters further assert that EPA missed the mark in considering only Executive Order 12898, because in January 2021, the current Administration signed additional Executive Orders that require agencies to advance and prioritize environmental justice (citing Executive Orders 13998 and 14008). The commenters

criticize EPA for failing to consider impacts on nearby environmental justice communities located on and near the Fort Berthold Indian Reservation under these additional Executive Orders and instead relying on its 2012 analysis under Executive Order 12898. The commenters assert that EPA must provide a new environmental justice analysis and tighter NO_x limits to improve visibility and air quality in the Fort Berthold Indian Reservation.

Response: EPA disagrees with these comments. As established in the responses above, the requirements of the State's SIP are substantively the same as in EPA's FIP. Our 2012 FIP for Antelope Valley Station resulted in substantial NO_x reductions from Units 1 and 2. In particular, in our 2012 FIP, we calculated that the emission limit of 0.17 lb/MMBtu (30-day rolling average) would lead to NO_x reductions of 3,889 tons per year for Unit 1 and 3,450 tons per year for Unit 2.³⁷ We expect this level of NO_x reductions will continue under North Dakota's SIP revision. Thus, the impacts of this action, like the 2012 FIP, are expected to be beneficial, rather than adverse, and its benefits are expected to accrue to communities in and near Indian country lands within the Fort Berthold Indian Reservation. Our review of Executive Orders 13990 and 14008, cited by the commenters, do not lead us to a different conclusion regarding the need for additional analysis under the circumstances at issue in this action.

Comment summary: The commenters state that EPA should not finalize approval of this action. The commenters also state that, if EPA were to finalize approval, we should make corrections (per comments above) to ensure that the EPA's approval of the SIP is substantively equivalent to the FIP. The commenters contend that otherwise EPA's approval of the SIP revision would be less stringent and inconsistent with the FIP and current emissions, and also undermine the Eighth Circuit's decision affirming the FIP for the Antelope Valley Station. The commenters state that the reductions and provisions required in the 2012 FIP should remain in place for Antelope Valley Station to maintain emission reduction requirements to better air quality in national parks and wilderness areas and the public health co-benefits for the environmental justice communities in the

³⁷ 76 FR 58631, Table 71. Calculated reductions were based on baseline (no controls) emissions of 7,625 tons per year and 6,765 tons per year for Units 1 and 2, respectively.

Fort Berthold Reservation and nearby communities. Finally, the commenters state that EPA should make various corrections, obtain missing SIP information from North Dakota after it amends its SIP, and add missing analysis as described in our summary of comments earlier in this notice. In doing so, the commenters believe that EPA should re-notice its proposal so that the public has an opportunity to comment on the missing information and analysis.

Response: We disagree that we should re-notice our proposal. The commenters concern regarding the enforceability of Amendment No. 2, as well as its equivalence to the FIP, have been addressed in response to other comments above. The level of NO_x emissions allowed under Amendment No. 2 will be the same as those allowed under the FIP.

Comment summary: A member of the public commented that they think it is a good idea that EPA is proposing to approve the North Dakota SIP revision addressing regional haze. The commenter believes the approval will help improve air quality which will have a positive effect on air pollution. The commenter states that the proposal will also satisfy some aspects of the CAA.

Response: We appreciate the commenter's support for our proposed action.

III. The EPA's Final Action

For the reasons stated in the preamble to the proposed rule and in this document, and with the clarifications to the regulatory text discussed herein, we are fully approving Amendment No. 2 to the North Dakota SIP for Regional Haze to satisfy certain requirements for the first implementation period of the regional haze program. Because we find that Amendment No. 2 satisfies the reasonable progress requirements for NO_x at Antelope Valley Station Units 1 and 2 for the first regional haze planning period, we are also withdrawing the corresponding portions of the North Dakota Regional Haze FIP at 40 CFR 52.1825. We are also restoring certain other nonregulatory text amendments under 40 CFR 52.1820(e), as described in the preamble to the proposed rule and in this document. Finally, we are removing from the Code of Federal Regulations the FIP requirements for Coal Creek Station that the Eighth Circuit vacated in *North Dakota v. EPA*.

IV. Incorporation by Reference

In this document, the EPA is finalizing regulatory text that includes incorporation by reference. In accordance with the requirements of 1 CFR 51.5, the EPA is finalizing the incorporation by reference of the SIP amendments described in section I.A of this preamble and set forth below. The EPA has made, and will continue to make, these materials generally available through <https://www.regulations.gov> (refer to docket EPA-R08-OAR-2010-0406) and at the EPA Region 8 Office (please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section of this preamble for more information).

Therefore, these materials have been approved by the EPA for inclusion in the SIP, have been incorporated by reference by the EPA into that plan, are fully federally enforceable under sections 110 and 113 of the CAA as of the effective date of the final rulemaking of the EPA's approval, and will be incorporated by reference by the Director of the Federal Register in the next update to the SIP compilation.³⁸

V. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review 13563

This action is exempt from review by the Office of Management and Budget (OMB) because it will apply to a single facility in the State of North Dakota. It is therefore not a rule of general applicability.

B. Paperwork Reduction Act (PRA)

This action does not impose an information collection burden under the PRA. Because this rule revises regional haze reporting requirements for a single facility, the PRA does not apply.

³⁸ 62 FR 27968 (May 22, 1997).

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. This action will not impose any requirements on small entities. This rule does not impose any requirements or create impacts on small entities as no small entities are subject to the requirements of this rule.³⁹

D. Unfunded Mandates Reform Act (UMRA)

This action does not contain an unfunded mandate of \$100 million or more as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

This action is not subject to Executive Order 13045. The EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

³⁹ See 13 CFR 121.201, Sector 22, Subsector 221.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement (NTTAA)

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

The EPA believes that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations and/or indigenous peoples, as specified in Executive Order 12898 (59 FR 7629, February 16, 1994).

K. Determination Under Clean Air Act Section 307(d)

Pursuant to CAA sections 307(d)(1)(B) and 307(d)(1)(V), the Administrator determines that this action is subject to the provisions of section 307(d). CAA section 307(d)(1)(B) provides that section 307(d) applies to, among other things, “the promulgation or revision of an implementation plan by the Administrator under [CAA section 110(c)].”⁴⁰ Under section 307(d)(1)(V), the provisions of section 307(d) also apply to “such other actions as the Administrator may determine.”⁴¹ To the extent the approval of North Dakota’s SIP revision is not expressly identified under section 307(d), the Administrator hereby determines that section 307(d) applies to this aspect of this action. The agency has complied with the procedural requirements of CAA section 307(d) during the course of this rulemaking.

L. Congressional Review Act (CRA)

This rule is exempt from the CRA because it is a rule of particular applicability that only applies to a single named facility.

⁴⁰ 42 U.S.C. 7607(d)(1)(B).

⁴¹ 42 U.S.C. 7607(d)(1)(V).

M. Judicial Review

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See CAA section 307(b)(2).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference,
Intergovernmental relations, Nitrogen dioxide, Particulate matter, Sulfur oxides.

Michael S. Regan,
Administrator.

40 CFR part 52 is amended as follows:

PART 52--APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart JJ--North Dakota

2. In §52.1820:

a. The table in paragraph (d) is amended by adding the center heading “Antelope Valley Station Units 1 and 2.” and the entry “PTC20031” at the end of the table.

b. The table in paragraph (e) is amended by adding the center heading “North Dakota State Implementation Plan for Regional Haze.” and the entry “North Dakota State Implementation Plan for Regional Haze” at the end of the table.

The additions read as follows:

§ 52.1820 Identification of plan.

* * * * *

(d) * * *

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
* * * * *					
Antelope Valley Station Units 1 and 2.					
PTC20031	Air pollution control permit to construct for Federal Implementation Plan Replacement	[insert date of publication in the Federal Register]	[insert date 30 days after date of publication in the Federal Register]	[insert Federal Register citation], [insert date of publication in the Federal Register]	.

(e) * * *

Rule No.	Rule title	State effective date	EPA effective date	Final rule citation/date	Comments
* * * * *					
North Dakota State Implementation Plan for Regional Haze.					
North Dakota State Implementation Plan for Regional Haze	North Dakota State Implementation Plan for Regional Haze	7/8/20	[insert date 30 days after date of publication in the Federal Register]	[insert Federal Register citation], [insert date of publication in the Federal Register]	Excluding provisions disapproved on April 6, 2012, 77 FR 20894.

§ 52.1825 [Removed and Reserved]

3. Remove and reserve § 52.1825.